United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

043

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,192

AM-CHI RESTAURANT, INC.,

Appellant,

v.

JOY R. SIMONSON, *et al,*

Appellees.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the D . Circuit

FILED DEC 1 1 1967

Nathan J. Paulson
CLERK

SAMUEL INTRATER

ALBERT BRICK

1010 Vermont Avenue, N. W.
Washington, D. C. 20005

Attorneys for Appellant

QUESTIONS PRESENTED ON APPEAL

1. Where an entertainer employed by appellant performed an isolated act of prostitution with a police officer, but there was no scintilla of evidence that appellant had any knowledge of such conduct, was the Alcoholic Beverage Control Board justified in suspending appellant's ABC license, or was such action of the Board arbitrary and capricious and without basis?

2. Did the lower court commit error in refusing to entertain any argument or to grant appellant a hearing on the legal issue of whether the action of the ABC Board was improper in that the Board acted as investigator, prosecutor, and judge?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AM-CHI RESTAURANT, INC.,

Appellant,

v.

JOY R. SIMONSON, *et al,*

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This case arises out of a ruling by the Alcoholic Beverage Control Board of the District of Columbia suspending appellant's license for a two-week period. The charge upon which this suspension was

based was that appellant allowed the premises to be used for unlawful purpose, namely, permitting an employee to solicit a patron for the purpose of prostitution.

At a hearing before the ABC Board, a police officer testified that he went to appellant's premises and was approached by a young lady who was employed as a dancer at said premises. The officer testified that the young lady led him to a table and then induced him to purchase her some champagne (J.A. 14, 15). The officer testified that he then engaged in a conversation with the young lady, at which time they agreed to "get together" (J.A. 15, 16, 17). No specific assignation was arranged on appellant's premises. The next day the officer telephoned the young lady – not at appellant's premises – and made a specific appointment for her to come to his hotel room where they were to engage in acts of prostitution. She arrived at his hotel room and he then arrested her. He stated that the young lady told him that she was instructed by her employers to try to have people buy her champagne and that if she sold enough champagne she would get a raise (J.A. 18). The officer testified that this one occasion was his only visit to appellant's premises (J.A. 18). The manager of the restaurant testified that she employs all the dancers and that every employee is a union member (J.A. 21). She testified that with regard to the young lady involved in this incident, the lady was discharged and that she would not think of hiring her back. That she instructed all the young ladies who came to work for appellant that they must behave "like ladies" (J.A. 22). She testified that she never had any knowledge or indication that this young lady or anyone else was soliciting prostitution on the premises (J.A. 22).

No evidence whatsoever was adduced to indicate any knowledge by appellant that the said entertainer or anyone else engaged in the practice of soliciting prostitution.

Action was filed below in the United States District Court to enjoin the ABC Board from enforcing its order suspending appellant's license. At that hearing appellant argued that there was no basis for the Board's action. Appellant also attempted to argue the legal proposition that the action of the ABC Board was improper in that said Board acted both as prosecutor and judge. That such action was in conflict with the ruling in the case of *Treat & Co. v. SEC*, 306 F.2d 260. The District Court inquired as to what evidence there was as to the conduct of the Board and counsel for appellant stated that the transcript of the proceedings before the ABC Board was incomplete in that the Court Reporter present at such hearing did not take down stenographically the statements of the Board which provided such evidence. Counsel for appellant, having been present at such hearing before the ABC Board, proffered his own testimony and alternatively requested a continuance so that he might call up the Assistant Corporation Counsel who had attended such hearing so that he also might testify as to the admissions by the ABC Board of their conduct which raised the issue as described in the *Treat* case. The Court refused to entertain such argument and refused to allow this issue to be raised (J.A. 25-28).

STATEMENT OF POINTS

1. Where there was no evidence that appellant had any knowledge of any illicit act being performed on its premises, it was improper for appellant to be penalized for such act.

2. Where there was no stenographic report of certain admissions made by the ABC Board, the District Court erred in refusing to accept the testimony of counsel as to what occurred or to continue the case for the purpose of allowing Corporation Counsel to come before the Court to give his testimony.

SUMMARY OF ARGUMENT

1. There was no evidence adduced to show that more than an isolated act of solicitation of prostitution occurred on appellant's premises. Moreover there was absolutely no evidence to indicate that appellant had any knowledge of any such conduct by its employees. Under the circumstances, being innocent of knowledge of any improper acts, appellant should not have been penalized for such acts.

2. In view of the fact that the Court Reporter had not stenographically taken down the comments of the ABC Board which showed that it was acting as both prosecutor and judge, the Court erred in refusing to accept the testimony of counsel who was present at such hearing or, alternatively, refusing to allow counsel to bring before the Court the Assistant Corporation Counsel who had also been present at such hearing and who could also testify as to what had occurred.

ARGUMENT

I.

This is a case in which the Alcoholic Beverage Control Board suspended appellant's license for allegedly permitting the solicitation of prostitution to occur on appellant's premises. The evidence that was brought before the Board showed merely that one of the entertainers hired by appellant sought to have a police officer purchase champagne. The evidence was that appellant encouraged such conduct by its employees; namely, the urging of the sale of champagne. Although the police officer also testified that he agreed with the young lady to engage in an act of prostitution, absolutely no shred of evidence was introduced to show that appellant had any hint of knowledge that such solicitation was taking place. In fact, the testimony was uncontradicted

that as soon as appellant learned of the foregoing, appellant discharged said employee and has not re-hired her since that occasion.

Appellant respectfully submits that it is not only improper but unconstitutional for one party to be punished for the criminal act of an employee of said party where the party had absolutely no knowledge whatsoever that the employee was engaging in such conduct.

Appellant refers this Honorable Court to the case of *Holmes v. United States*, 269 Fed. 489, 50 App. D.C. 147. That case involved an alleged violation of Title 22, D. C. Code, § 2713. That section of the Code provides that any person permitting premises to be used for lewdness, prostitution, etc., is subject to having said premises attached, the furniture therein sold and said premises closed down. In the *Holmes* case pursuant to said statute the property of the defendant was seized, and an injunction was issued closing the premises for one year and ordering the sale of fixtures, furniture, etc. This Court held that in order for the defendant to be found to have violated said statute, it was necessary to show that defendant possessed a "guilty knowledge" of the acts allegedly occurring in his hotel. This Court stated (50 App. D.C. page 151) that parties came under the "provisions of the act only when guilty knowledge was brought home to them." This Court further stated, at page 149, "Under such an interpretation, the act is reasonable and free from constitutional infirmities."

In the instant case there was absolutely not the slightest shred of evidence to indicate that the appellant had "any guilty knowledge" of unlawful acts. The only knowledge appellant had was that entertainers employed by appellant were urging customers to purchase champagne.

Appellant submits that the *Holmes* case is applicable "on all fours" to the instant case and is controlling. The appellant herein was not shown to have any guilty knowledge and therefore to punish appellant would be unconstitutional.

II.

In addition to the fact that there was no evidence showing appellant knowingly permitted improper acts upon appellant's premises, and that therefore the ABC Board improperly suspended appellant's license, appellant also sought to urge before the District Court the proposition that the entire procedure before the ABC Board was improper. Appellant sought to raise the issue as set forth by this Court in the case of *Treat & Co. v. SEC*, 306 F.2d 260, 113 U.S. App. D.C. 100. The *Treat* case set forth the proposition that an administrative agency cannot act at the same time as investigator, prosecutor, and judge. Appellant sought to show that this was, in fact, the procedure being followed by the ABC Board. When questioned as to what evidence there was to support this contention, counsel sought to notify the Court of admissions made at the hearing by the ABC Board that said Board was the one that instituted and instigated the prosecution of the appellant and thereafter was sitting to judge appellant for its alleged violations. Unfortunately, the reporter who had taken down the proceedings at the ABC Board hearing had not transcribed these remarks by the ABC Board. Nonetheless counsel for appellant, as an officer of the Court, proffered his own statement that this actually had occurred and even volunteered to be placed under oath and to testify as to said occurrence. The Court refused to allow this. Counsel for appellant thereafter asked to be allowed to produce before the Court the Assistant Corporation Counsel who had been present at the said ABC Board hearing so that he could corroborate these facts, and the Court refused to allow this also.

From the foregoing it is apparent that the District Court refused to allow appellant a hearing on a very important legal issue involved in this matter. Appellant submits that in fact the action of the ABC Board

was unconstitutional under the *Treat* case, but whether or not appellant could so have proved, certainly appellant should have been given the opportunity to present this issue before the Court and have the Court rule upon the same. Instead, the Court absolutely refused to allow appellant any hearing whatsoever on this point. Appellant respectfully submits that this action of the District Court constituted an unconstitutional and erroneous imposition of punishment upon appellant without affording appellant a hearing.

CONCLUSION

Appellant therefore respectfully urges that upon the basis of the first argument presented above this Court hold that the suspension of appellant's license was an arbitrary and capricious act of the ABC Board without any evidence to sustain its action and that, therefore, such suspension order should be set aside.

Alternatively, appellant urges that in the failure of a reversal upon the first grounds, this Court should reverse the decision of the District Court and remand this matter to said Court for a further hearing upon the issue of whether the action of the ABC Board was unconstitutional under the holding of the case of *Treat v. SEC, supra.*

Respectfully submitted,

SAMUEL INTRATER

ALBERT BRICK
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
Attorneys for Appellant

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JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AM-CHI RESTAURANT, INC. A Body Corporate 421 - 11th Street, N. W. Washington, D. C. Plaintiff	)	
v.	)	Civil Action No. 1663-67
JOY R. SIMONSON, JAMES G. TYSON, J. BERNARD WYCKOFF Constituting the Alcoholic Beverage Control Board of the District of Columbia District Building 14th and E Streets, N. W. Washington, D. C. Defendants	)	

COMPLAINT – INJUNCTION

1. Comes now the plaintiff, by and through its attorneys, and prays that this Honorable Court issue an injunction, permanent and pendente lite, against the defendants, enjoining and restraining said defendants from the enforcement of its Order of Suspension dated the 26th day of June, 1967, and as grounds therefor states as follows:

1. That the plaintiff is a body corporate organized under the laws of the District of Columbia and doing business in the said District of Columbia. That said plaintiff is the holder of a retailer's Class C license issued by the Alcoholic Beverage Control Board of the District of Columbia, namely, license number W865.

2. That the defendants constitute the Alcoholic Beverage Control Board of the District of Columbia. That on, to wit, June 20, 1967,

the said defendants conducted a hearing on charges that the plaintiff had violated Section 17 of the Alcoholic Beverage Control Act in that said plaintiff had allowed the premises for which its license was issued to be used for an unlawful purpose, namely, the solicitation of prostitution.

3. That testimony under oath was taken at such hearing and not one scintilla of evidence was adduced by the defendants to support the contention that the plaintiff condoned, permitted, or even knew or was aware of the fact that said premises were being used for such unlawful purpose.

4. That notwithstanding the complete failure of any evidence to show participation, condonation, or knowledge by the plaintiff of any such unlawful acts, or even that more than one isolated such act was ever committed on the premises, the said defendants, by Order dated June 26, 1967, suspended the said retailer's Class C license number W865 held by the plaintiff, such suspension to operate for a period of fourteen days from 8:00 A.M. July 11, 1967, to 8:00 A.M. July 25, 1967.

5. That the said action of the defendants was arbitrary and capricious and without any basis or foundation in fact or in law. That the said Order of Suspension, if enforced, will inflict irreparable injury and damage upon the plaintiff in that the loss of business resulting therefrom will be totally lost and irretrievable and that, furthermore, such Order would result in the virtual closing down of the premises with attendant loss of goodwill and business which could result in the destruction of the said business property of the plaintiff.

6. That plaintiff has exhausted its administrative remedies in that the Order of Suspension is for a period of less than thirty days, and pursuant to Title 25 of the District of Columbia Code, §106, no further administrative review or appeal may be had on such an Order unless the suspension period exceeds thirty days.

7. That in view of the imminent approach of the first effective date of suspension in the aforesaid Order issued by the defendants and

in further view of the intervening weekends and national holiday, insufficient time remains to the plaintiff to obtain a hearing on a Preliminary Injunction without the issuance of a Temporary Restraining Order.

WHEREFORE, the premises considered, plaintiff prays as follows:

1. That this Honorable Court issue a Temporary Restraining Order enjoining the defendants from the enforcement of the Suspension Order issued by said defendants on the 26th day of June, 1967.

2. That the said defendants be enjoined pendente lite and permanently from the enforcement of the Suspension Order issued by the said defendants on the 26th day of June, 1967.

3. And for such other and further relief as to the Court appears meet and proper.

AM-CHI RESTAURANT, INC.

By /s/ Leonard Wu
President

BRICK AND INTRATER

By: /s/ Samuel Intrater
Attorneys for Plaintiff

* * *

DISTRICT OF COLUMBIA, ss:

Leonard Wu, being first duly sworn on oath according to law, deposes and states as follows: That he is the President of the plaintiff corporation; that he has read the foregoing complaint by him subscribed and knows the contents thereof, and that the matters and things contained therein are true to his best knowledge, information and belief.

/s/ Leonard Wu

[JURAT the _____ day of June, 1967]

[Filed July 13, 1967]

MOTION OF THE DEFENDANTS JOY R. SIMONSON, JAMES G. TYSON AND J. BERNARD WYCKOFF FOR SUMMARY JUDGMENT

These defendants move the Court to grant summary judgment in their favor upon the following ground:

The complaint, when read together with the affidavit of the defendant, Joy R. Simonson, Exhibits A through E, all of which are attached hereto and by reference made a part hereof, and all other pleadings and exhibits filed in the instant case, demonstrates that there is no genuine issue as to any material fact and that these defendants are entitled to judgment as a matter of law.

/s/ Charles T. Duncan
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation
Counsel, D.C.

/s/ Patrick O'Donnell
Assistant Corporation
Counsel, D.C.
Attorneys for Defendants

* * *

[Certificate of Service]

EXHIBIT "A"

June 7, 1967

Am-Chi Restaurant, Inc.
t/a Stagecoach Restaurant & Lounge
421 11th Street, N.W.
Washington, D.C. 20004

You are hereby directed to appear before the Alcoholic Beverage Control Board in Room 201, District Building, 14th & E Streets N.W., on Tuesday, June 20, 1967 at 2:00 P.M., to show cause why your Retailer's Class "C" License No. W865 should not be revoked or suspended for the following reason:

It is alleged that you, being the holder of a Retailer's License, Class "C", did violate certain provisions of the Alcoholic Beverage Control Act at the premises for which the license was issued, in that, to wit:

(1) On Tuesday, March 28, 1967, at approximately 12:15 a.m., in violation of Section 17 of the Alcoholic Beverage Control Act, you allowed the premises for which the license was issued to be used for an unlawful purpose by your permitting Faye Foreman, a/k/a Donna Hatch, who was employed by you, to solicit a patron for the purpose of prostitution.

The corporation is entitled to be represented by Counsel at the above hearing, although such is not required. The failure of the corporation and each of its principal officers and directors to appear at the above hearing will not preclude the Board from acting in this matter.

ALCOHOLIC BEVERAGE CONTROL BOARD
IN THE DISTRICT OF COLUMBIA

/s/ Joy R. Simonson
(Mrs.) Joy R. Simsonson
Chairman

#9003
dla

EXHIBIT "C"

BEFORE THE ALCOHOLIC BEVERAGE CONTROL BOARD
IN THE DISTRICT OF COLUMBIA

IN RE: Am-Chi Restaurant, Inc.
t/a Stagecoach Restaurant & Lounge
Holder of a Retailer's Class "C"
License No. W865 at premises
421 11th Street N.W.
Application No. 9003

FINDING OF THE BOARD

A hearing was had in the above-entitled matter on June 20, 1967, at 10:00 A.M., and various witnesses appeared and testified. The licensee was notified in accordance with Section 2-118 of the Regulations promulgated under the District of Columbia Alcoholic Beverage Control Act, and Mr. Wu, President, appeared.

MEMBERS OF THE BOARD PRESENT

Joy R. Simonson
James G. Tyson
J. Bernard Wyckoff

FOR THE RESPONDENT

Samuel Intrater, Esq.
1010 Vermont Ave. N.W.

FOR THE GOVERNMENT

Semi Feuer, Esq.
Assistant Corporation Counsel

(1) The Board FINDS that on Tuesday, March 28, 1967, at approximately 12:15 a.m., in violation of Section 17 of the Alcoholic Beverage Control Act, the corporation allowed the premises for which the license was issued to be used for an unlawful purpose by its permitting Faye Foreman, a/k/a Donna Hatch, who was employed by it, to solicit a patron for the purpose of prostitution.

ORDER

It is, therefore, ORDERED by the Majority of the Board this 26th day of June 1967, that the Retailer's Class "C" License No. W865 held by Am-Chi Restaurant, Inc., t/a Stagecoach Restaurant & Lounge, at premises 421 11th Street N.W. be SUSPENDED for a period of fourteen (14) days from 8:00 A.M., Tuesday, July 11, 1967 to 8:00 A.M. Tuesday, July 25, 1967.

It is further ORDERED that copies of this Finding and Order be sent the respondent, its attorney, and to John B. Layton, Chief, Metropolitan Police Department.

ALCOHOLIC BEVERAGE CONTROL BOARD
IN THE DISTRICT OF COLUMBIA

/s/ Joy R. Simonson

/s/ James G. Tyson

MINORITY OPINION

I agree with the Finding of the Board, however I feel the penalty should be twenty (20) days.

/s/ J. Bernard Wyckoff

#9003
dla

OPPOSITION TO DEFENDANT'S MOTION, AND COUNTER-MOTION, FOR SUMMARY JUDGEMENT

Comes now the plaintiff and opposes the motion of the defendants for summary judgment and as grounds therefor states as follows:

1. Defendants fail to set forth grounds upon which they are entitled to summary judgment.

2. The record herein, including the transcript of the hearing before the A.B.C. Board clearly shows that there was not a scintilla of evidence to support the finding that the plaintiff was allowing the premises to be used for an unlawful purpose by permitting an employee to solicit a patron for the purpose of prostitution.

3. That there is not a scintilla of evidence to show that the plaintiff had any knowledge or notice of any unlawful use of its premises and that such knowledge or notice are essential to its being charged with any violations.

4. That the action of the defendants in suspending plaintiff's license is clearly an abuse of authority, it is arbitrary and capricious, without basis or foundation within fact or law and a violation of plaintiff's constitutional rights to due process.

5. Such other grounds as set forth at time of hearing.

WHEREFORE plaintiff prays that the motion of defendants be denied and that plaintiff's motion for summary judgment be granted.

BRICK AND INTRATER

BY: /s/ Samuel Intrater
Attorneys for Plaintiff

* * *

[Certificate of Service]

POINTS AND AUTHORITIES

Plaintiff submits that the only evidence presented to the A.B.C. Board was that on one isolated incident an exotic dancer employed by the plaintiff met the police officer on plaintiff's premises and requested that he purchase a bottle of champagne. The evidence further showed that plaintiff was aware of such conduct and perhaps even encouraged it. The testimony further indicated that said dancer and police officer agreed to "get together." The next day the officer contacted the dancer away from the plaintiff's premises and she agreed to an act of prostitution.

There was not the slightest evidence to show that the plaintiff was aware that said dancer was engaging in such illegal acts or that this was other than an isolated act. In fact, upon learning of such conduct plaintiff immediately discharged such employee.

Plaintiff submits that it is implicit in the law that to be charged with permitting unlawful acts to occur on one's property a party must be shown to have knowledge of the occurrence of such acts.

Plaintiff refers this Honorable Court to the case of Holmes v. United States, 269 Fed. 489, 50 App. D.C. 147. That case involved an alleged violation of Title 22, D.C. Code § 2713. That section of the Code provides that any person permitting premises to be used for lewdness, prostitution, etc., is subject to having said premises attached, the furniture therein sold and said premises closed down. In the Holmes case pursuant to said statute the property of the defendant was seized, and an injunction was issued closing the premises for one year and ordering the sale of fixtures, furniture, etc. The Court of Appeals of the District of Columbia — now the United States Court of Appeals for the Columbia Circuit held that in order for the defendant to be found to have violated said statute, it was necessary to show that defendant possessed a "guilty knowledge" of the acts allegedly occurring in his hotel. The Court stated (50 App.,D.C. Page 151) that parties came under the "provisions of the act only when guilty knowledge was brought home to them."

The Court further stated, at page 149, "Under such an interpretation the act is reasonable and free from constitutional infirmities."

In the instant case there was absolutely not the slightest shred of evidence to indicate that the plaintiff had "any guilty knowledge" of unlawful acts. The only knowledge plaintiff had was that entertainers employed by plaintiff were urging customers to purchase champagne.

Plaintiff refers this Honorable Court to the exhibit attached hereto constituting an article appearing in the Sunday Star on June 25, 1967. This article reflects that the A.B.C. Board has apparently in its chambers condemned the procedure whereby night club entertainers request customers to purchase drinks. This article further reflects that the A.B.C. Board requested the District of Columbia Commissioners to prohibit such a practice. It becomes apparent therefore, that the A.B.C. Board has attempted in this case, to do indirectly what it has no authority to do directly. That is, the A.B.C. Board, having no authority to punish a restaurant or night club whose employees solicit the purchase of beverages, has indeed levied a judgment against the plaintiff for such act under the guise of punishing the plaintiff for permitting an unlawful use of the premises. This, despite the fact that there is no shred of evidence to indicate that such unlawful act was other than an isolated act and that plaintiff had any knowledge thereof.

Plaintiff therefore submits that the action of the A.B.C. Board was arbitrary and capricious and the suspension of plaintiff's license under such circumstances operates as an unconstitutional violation of plaintiff's rights to due process.

BRICK AND INTRATER

BY: /s/ Samuel Intrater
Attorney for Plaintiff

* * *

STATEMENT OF FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. A police officer went to plaintiff's premises, while on duty with the Morals Squad and was met by a dancer employed by plaintiff who conducted him to a table and urged him to purchase champagne.

2. Said officer made an appointment to meet said dancer the next day to engage in acts of prostitution.

3. The parties did so meet the next day.

4. Said officer had never previously or since been to the premises of the plaintiff nor were any other such incidents, other than the single incident as the above alleged, ever observed by the police.

5. No testimony or other evidence was adduced to show any knowledge by the plaintiff of such illegal conduct by any of its employees.

6. Immediately upon learning of the conduct of said dancer plaintiff discharged said dancer and refused thereafter to rehire her.

7. Said dancer and all other entertainers employed by the plaintiff and all of the theatrical agencies with whom plaintiff deal were members in good standing of Actors Guild Variety Artists, the authorized union representing the Actors Guild and other performers.

8. Shortly after the hearing, the defendants requested the District of Columbia Commissioners to pass a regulation prohibiting the solicitation of alcoholic beverages by bistro employees.

BRICK AND INTRATER

BY: /s/ Samuel Intrater
Attorneys for Plaintiff

* * *

[Filed Aug. 3, 1967]

ORDER

Upon consideration of the motion of defendants, Joy R. Simonson, J. Bernard Wyckoff, and James G. Tyson, for summary judgment, of plaintiff's cross-motion for summary judgment, of the memorandum of points and authorities in support of and in opposition to the respective motions, of oral argument in open court by the counsel for plaintiff and counsel for the defendants, the consent of the parties that these cross-motions for summary judgment will be dispositive of plaintiff's motion for preliminary injunction, and it appearing that there is no genuine issue as to any material fact, it is, by the Court, this 3rd day of August, 1967.

ORDERED:

1. That defendants' motion for summary judgment be, and the same is, hereby granted.

2. That plaintiff's motion for summary judgment be, and the same is, hereby denied.

3. That the temporary restraining order, which was to have expired on July 25, 1967, be, and the same is, hereby extended to and including August 9, 1967, in order to allow plaintiff an opportunity to apply to the United States Court of Appeals for the District of Columbia Circuit for a stay of this judgment pending appeal.

/s/ Joseph C. Waddy
JUDGE

[Certificate of Service]

[Filed August 4, 1967]

NOTICE OF APPEAL

Notice is hereby given this 4th day of August, 1967, that plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 3rd day of August, 1967 in favor of defendants against said plaintiff.

/s/ Samuel Intrater
Attorney for Plaintiff
1010 Vermont Avenue, N.W.
Washington, D.C. 20005

/s/
Attorney for Defendant:
Corporation Counsel
District Building

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
ON CITATION HEARING

1 BEFORE THE ALCOHOLIC BEVERAGE CONTROL BOARD
IN THE DISTRICT OF COLUMBIA

IN RE: AM-CHI RESTAURANT, INCORPORATED
t/a Stagecoach Restaurant & Lounge
Holder of a Retailer's Class "C"
License No. W865, at premises
421 11th Street, N.W.
Application Number 9003

Tuesday, June 20, 1967

* * * * *

3 ALLEGATIONS:

"(1) It is alleged that you, on, to wit, Tuesday, March 28, 1967, at approximately 12:15 a.m., in violation of Section 17 of the Alcoholic Beverage Control Act, allowed the premises for which the license was issued to be used for an unlawful purpose by your permitting Faye Foreman, a/k/a Donna Hatch, who was employed by you, to solicit a patron for the purpose of prostitution."

* * * * *

4 PVT. ROBERT J. CURTIS

took the witness stand, for and in behalf of the Government, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FEUER:

Q. Officer, would you please state your full name, rank and duty assignment? A. Private Robert J. Curtis, assigned to the Fourth Precinct.

Q. Drawing your attention to Tuesday, March 28, 1967, at approximately 12:15 a.m., were you so assigned that day? A. I was on detail to the Morals Division, at that time.

Q. All right. With respect to that day, drawing your attention to 421 11th Street, Northwest, the Am-Chi Restaurant, trading as Stagecoach Restaurant and Lounge, did you have occasion to be at those premises? A. Yes, sir. I did.

Q. Will you tell the Board what you did upon arriving? A. This is approximately 12:15 a.m., on the 28th. I entered the room called the Celebrity Room, which is located above that building. As I entered

5 the premises I was greeted by a young lady who took my coat and gave it to a hatcheck girl, who showed me back to the back of the restaurant to a table and she sat down and joined me.

Q. Do you know the lady? A. She was identified as Donna Hatch. This young lady asked me would I buy her a drink. I said I would and we were shortly joined by a white male subject. I don't know if he was the doorman or some employee, but he was there in some capacity.

MR. INTRATER: I can't understand you.

THE WITNESS: We were joined by a white male later identified as Nick Dumis (phonetically), I believe. He asked what would we have and she said a bottle of champagne. I asked if she wouldn't have a drink instead and she shook her head and said that in that part of the restaurant I'd have to buy her champagne.

Q. (By Mr. Feuer:) Who said that? Donna or the waiter? A. Donna actually said that. I agreed to buy her a bottle of champagne and this gentleman drew the bottle of champagne and my drink and told me to pay for the bottle of champagne then but that I could pay for my drink later. I believe the bottle of champagne was $14.00, and he stood there

6 and Donna said, "You're going to have to give him a tip", which I did.

He left and we had a brief conversation. The young lady asked where I was staying in town.

Q. Before you go into that conversation, would you briefly describe the layout of the premises where you were and what the rest of the restaurant looked like? A. In the extreme rear of the restaurant it is a lounge affair with a table in front, very dark. Darker than the rest of the restaurant.

* * * * *

Q. Would you continue with the conversation? A. We had a brief conversation and she asked me where I was staying. I said, "At the Diplomat Hotel." "I had a friend staying with me at this time". She said, "Maybe we'll be able to get together tonight." I said, "No, but my friend will be leaving tomorrow." She also mentioned she had an apartment in Maryland. I said, "Well, I don't have a car and I wasn't familiar with the area so I didn't think we could get together that way." She said to call her the next day. She said, "Call after 3 o'clock tomorrow".

7 At this time she had to get up to dance. She said after she left that Rick would probably be back over and to tell him that I was a little short of money and that way I wouldn't spend any more money on champagne.

* * * * *

THE WITNESS: At this time she said she'd leave, she had to dance. She was a dancer in the show and she said when she left Rick would bring over another girl and want me to buy her champagne, for me to tell her I was a little short of money and couldn't afford it. She left the table and a short time later Rick returned with another white female and introduced her and she sat down and asked for a bottle of champagne. I told her I was a little short of money, could I just buy her a drink, so I bought her a champagne cocktail. She drank the champagne cocktail and left. At this time Rick moved me up to the table up front to watch the show.

* * * * *

8 Q. (By Mr. Feuer:) Would you go into the discussion a little more deeply with respect to any propositions made by this girl by the name of Donna Hatch? A. She said it would cost me $75.00 for her to engage in any sex with me.

Q. Do you remember the exact words used by you and by her? A. Well, basically it was just get together and it was understood basically what we were going to do.

MR. WYCKOFF: Who said that?

THE WITNESS: That we would get together?

MR. WYCKOFF: (Nodded in the affirmative).

THE WITNESS: One time or another both said it. I think first she said could we get together later on and I said we could get together

9 the next day at my motel.

Q. (By Mr. Feuer:) But, the price of $75.00 was agreed to by both of you? A. Right. She quoted the $75.00.

Q. She quoted the $75.00? A. Yes.

Q. Would you continue then? A. I left the club at that time and later on in the day, approximately 4:30 -- before she left she gave me a card with her name, address and phone number on it and later on that day, about 4:30 I called the phone number given me and she answered the phone and I told her Room 6, Diplomat. She said she'd be out in about an hour. Approximately an hour, 10 minutes to 6, quarter to 6, she joined me and came to the room. I asked her if she'd have a drink and we had a brief conversation and she said, "Let's get down to business." She'd have to have the money before we get doing anything. I gave her $75.00, marked money, police money. She disrobed completely and I partly disrobed and at this time I admitted Sergeant Zoglio, who observed her disrobed and placed her under arrest.

* * * * *

10 A. Well, Sergeant Zoglio advised her of her rights as to making any statements unless accompanied by a lawyer and at this time he asked her how long she had been doing this thing and she said this was about the sixth time she had done it, and he asked her how she operated or usually met her dates and she said at the Celebrity Room and then went with them to motels and hotels and got somewhere between $75.00 and $100.00.

Q. Did she say anything with respect to purchasing drinks at the restaurant? A. She said she worked there and they were required to have the men buy champagne and if they bought enough champagne they'd get a raise in salary.

* * * * *

CROSS EXAMINATION

11 BY MR. INTRATER:

* * * * *

12 Q. Is that all you had to do with this particular Am-Chi Restaurant? A. That's correct.

Q. Have you been back there since? A. No.

Q. Had you been there before? A. No.

* * * * *

13 MR. WYCKOFF: Did she tell you who had told her, who had instructed her to this routine?

THE WITNESS: No.

MR. WYCKOFF: How did she do that? How did she tell you about it?

THE WITNESS: She said where she worked she was expected to.

MR. WYCKOFF: Expected to what?

THE WITNESS: Expected to have men buy her champagne and if she sold enough champagne she'd get a raise.

* * * * *

14 DET. SGT. E. M. ZOGLIO

took the witness stand, for and in behalf of the Government, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FEUER:

Q. Officer, would you please state your full name, rank and duty assignment? A. Eugene M. Zoglio, Detective Sergeant, supervising the Prostitution Squad, Morals Division.

Q. Were you so assigned on March 28, 1967, about 4:30 p.m.? A. I was.

Q. All right. Drawing your attention to that date and that time at the Diplomat Motel, Room 6, did you have occasion to be there that day? A. I did.

Q. Would you tell the Board what you did there? A. I was covering Officer Curtis who was in an undercover capacity at the time. I observed this female go into the room, Number 6. A short time later Officer Curtis came to the door. I came into the room. I saw this Donna Hatch who was identified as Faye Foreman. She was in the room,

15 completely nude. I asked her where the money was. She said, it was in her purse. I went into her purse and pulled out $75.00, of which was marked on this card, three 20's, one 10, and a 5. I advised her of her rights. Told her we were from the Vice Squad and she didn't have to make any statements. She understood this. We transported her down to the Women's Bureau and I talked to her down there. I asked her how long she had been hustling. She said she had only six tricks. I asked her where she met her dates and she said she met them all at the Celebrity Room where she was dancing. I asked her what she was getting for them. She said it averages between $75.00 and $100.00 a trick and she would go to the man's hotel or motel room with them. I told her what Officer Curtis had reported to me about the girls appearing to be pushing champagne in the place and if she was required to push champagne. She said she was. I asked her if she had a kickback on the champagne, as I understood some of the clubs are doing, but she said Sam, who is the owner, said if they sold enough champagne he would give them a raise in pay, if they pushed an adequate amount of champagne. I asked her and she particularly mentioned Sam's name when I was asking her about this.

* * * * *

16 CROSS EXAMINATION

BY MR. INTRATER:

Q. Did you, yourself, go up to the Celebrity Room? A. I went at a later date with Lieutenant Fochett.

Q. What did you do on that occasion? A. We advised Sam Schanker, Mrs. Schanker's husband, who we believed was the owner, what had taken place, about his maitre d' who was hustling these guys and pushing champagne, about the girls sitting in this dark corner pushing champagne and told him that stuff had to stop.

Q. I didn't understand that. A. We told him that this stuff would have to stop. They couldn't continue doing this type of thing. He said as far as the girls hustling he wasn't going along with any of that and we told him we felt they were going along with them hustling and he said he couldn't be responsible for every single girl in the place. We told him we understood that but if he gave them a situation condusive for hustling he is responsible in that respect and by saying that we meant this dark corner where they would sit and drink champagne. It's not very visible to actions by people just walking in the club.

* * * * *

17 MR. WYCKOFF: Who is Sam Schanker?

THE WITNESS: Sam Schanker is the man that, to our knowledge, runs and owns the Am-Chi, or Celebrity Room. His wife here, Mrs. Schanker, according to the license, I understand, she is an officer in the corporation. We talked to Sam. He's the one that was there at the time. He was there and the one that -- that is he is the man Lieutenant Fochett is familiar with and talked to.

* * * * *

MR. WYCKOFF: Could you tell us again the responsibility he took for it in his talk with you?

18 THE WITNESS: He said that he knew nothing about their hustling, about the girls taking customers out of there for prostitution. We advised him about the pushing of champagne and about making it condusive for the girls to hustle these guys because of the dark area in the back of the club. He acknowledged there was a dark area back there

and this could happen. We also told him about the maitre d', and warned him about this man that as soon as the customer walks in he grabs him and wants to sit him with a girl and pushes the champagne. We told him a maitre d' can't operate that way and he acknowledged that the maitre d' was doing this thing.

MR. WYCKOFF: So he did admit that he knew?

THE WITNESS: He acknowledged that the maitre d' was pushing and that he did have this dark corner.

MR. INTRATER: When you say, "pushing", you mean pushing the champagne?

THE WITNESS: Right.

* * * * *

32 JEAN SCHANKER

took the witness stand, for and in behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. INTRATER:

* * * * *

33 Q. * * * What is your connection with the operation at the Am-Chi Restaurant?

* * * * *

A. I employ the help, employ the entertainment. My name is on every contract. Every girl is an A.G.V.A. member.

Q. Would you explain to the Board and for the record just what is an A.G.V.A. member? A. Well, union members, and they have certain rights; that they have to work by the week when you hire them, that they have to work six days that we hire girls for. You know, some places that are open seven days, they hire them seven days and if there's any complaints or anything I go to the agent. You see we hire girls through an agent and every agent has to be a member of A.G.V.A. himself.

MR. WYCKOFF: You're talking about entertainers?

THE WITNESS: Yes, sir.

* * * * *

35 A. That's right. She's not working in the Celebrity Room. I wouldn't think of hiring her back. As far as any girl working in the Celebrity Room, they know they have to be a lady.

Q. Do you give these girls any instructions when they first come to work for you? A. These girls know they have to act like ladies, as far as drinking is concerned. Now, sometimes they just walk by and a customer will start talking, "Can I buy you a drink". That's o.k., but they're not suppose to actually go up to a customer and say,"Buy me a drink". If anyone did that and I found it out they wouldn't be there.

* * * * *

36 Q. Have you ever had before this, any knowledge or any indication that this Donna Hatch, or anybody else, was doing any soliciting on the premises? A. No, I didn't.

* * * * *

37 CROSS EXAMINATION

38 BY MR. FEUER:

Q. Did I understand you're an officer of the corporation? A. Yes, sir.

Q. What type of officer are you? A. I believe it is one share. I'm cashier.

* * * * *

Q. Who's in charge of the Celebrity Room? A. I am, sir.

* * * * *

43 MR. TYSON: Do you hire these dancers and maitre d's, and so forth, for the corporation?

44 THE WITNESS: Yes, sir.

* * * * *

MR. WYCKOFF: How long has Nick been there?

THE WITNESS: Nick has been there about a year and a half.

MR. WYCKOFF: Have you seen him take some of the entertainers to a table where a man had come in alone and was sitting?

THE WITNESS: Well --

MR. WYCKOFF: As was reported here?

THE WITNESS: Has he taken --

MR. WYCKOFF: Have you seen him take one of the entertainers to a table where a man was sitting alone?

THE WITNESS: Not really, unless a man asked to see or speak to a girl, I mean.

MR. WYCKOFF: How would you have heard that?

THE WITNESS: I wouldn't know. No, sir. I wouldn't know.

MR. WYCKOFF: You have never seen him do this?

THE WITNESS: Well, I've seen him walk over to a table.

MR. WYCKOFF: Taking a girl to a table where a man was sitting alone?

THE WITNESS: Well, I won't say I didn't see him do that, but I mean sometimes when a man sits down he asks can he speak to this girl or something like that and naturally he'll bring her over, this girl and say yes or no.

* * * * *

PVT. ROBERT J. CURTIS

resumed the witness stand, for and in behalf of the Government, and having been previously duly sworn, was examined and testified further as follows:

* * * * *

CROSS EXAMINATION

BY MR. INTRATER:

* * * * *

53 Q. * * * Was the first thing that was said when she asked you where you were staying and you said, "in a motel with a friend", or had anything been said before that? A. Prior to that we talked about different clubs in the area. She did say if I wanted to meet a girl this was the best club in town to meet a girl. This was prior to her saying we'd be able to get together.

Q. What other club? A. I said I wanted some action. I was trying to give the impression I was from out of town and didn't know my way around.

Q. So, you asked her, "Where's the action in town"? A. And she said there were several clubs in town. If I wanted to meet a girl this was the best club in town.

* * * * *

54 Q. Incidentally, you went there on duty. Is that correct?
A. Yes, sir.

Q. You weren't going up there for a night out? A. I was assigned there.

Q. You were assigned to the Morals Squad and you went up to see if you could make a pick up. Is that correct? A. I was conducting an investigation in an undercover capacity.

* * * * *

55 MR. WYCKOFF: Who brought up this question of the champagne?

THE WITNESS: She asked me if I'd buy her a drink. I said I would. Nick asked what we would have to drink and she said she wished a bottle of champagne. I tried to get her to have a drink and Nick shook his head. He didn't say anything. He just shook his head. She said, "If you want to sit back here you have to buy a bottle of champagne."

* * * * *

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AM-CHI RESTAURANT, INC., a body corporate,
Plaintiff,
vs.
JOY R. SIMONSON, et al.,
Defendants

Civil Action No. 1663-67

Tuesday, July 25, 1967
Washington, D.C.

* * * * *

2 MR. INTRATER: If Your Honor please, although I have not cited this in my brief, another basis to oppose the Board's action has come to my attention, and I have spoken with Mr. O'Donnell on the telephone concerning this other matter and have cited the case to him and he has, in fact, indicated knowledge of this other case.

This other proposition that I make is this, if Your Honor please: that the entire procedure of the Board is unconstitutional in that the Board acts not only as an adjudicatory body but also, as initially, the prosecuting body. In this case, and in other cases, I understand it is the Board that decides to charge these various restaurants, night clubs, et cetera, with violations, and then the Board sits in determination as an adjudicatory body to determine whether or not they have done so.

In short, first they say "you have done so and come before me and we will have a proceeding so that we can judicially say you have done so."

If Your Honor please, in this case, unfortunately, it is not part of the record. I have checked with the reporter who was present and she told me that because of the fact that this came out during argument,

3 which she does not take down, she did not transcribe these remarks.

As an attorney, as a member of the Bar of the District of Columbia, as an officer of the Court, I can assure the Court of the following dialogue that occurred. I might say --

THE COURT: I don't like to cut you off, Mr. Intrater, but I have a record before me as to what was supposed to have occurred.

MR. INTRATER: If Your Honor please--

THE COURT: If there is a stipulation there is something else occurred, then I will consider it. Is there such a stipulation now in Court between you and counsel for the Board?

MR. INTRATER: I don't --

THE COURT: Otherwise I must go on the basis of the record before me.

MR. INTRATER: If Your Honor please, Your Honor will note that the record is incomplete. The record does not contain argument. The record does not contain remarks made by the Board. Now, I will certainly ask counsel whether he is willing to stipulate that my word can be accepted by the Court.

MR. O'DONNELL: I cannot so stipulate. I wasn't there.

4 THE COURT: I wouldn't take the position that your word couldn't be accepted by the Court, Mr. Intrater. That is not the position of the Court. As an officer of the Court, I believe your word could be accepted by the Court.

On the other hand, an orderly procedure demands what we act upon be made a part of the record.

MR. INTRATER: I am perfectly willing that the Court put me under oath so I may testify.

THE COURT: Well, of course, you can be put under oath and testify so far as that part is concerned. But I don't think this becomes necessary. All I am saying is that I have before me a record of what is supposed to have occurred. If you say this record is incomplete, the way to proceed is to challenge the record before it got here.

* * * * *

THE COURT: But that hasn't been raised at all in the pleadings. As I say, the only thing that is before me at this time is whether there is substantial evidence in the record to support the finding of the Board. That

5 is all that is before me.

* * * * *

THE COURT: Isn't that all that is before me, what occurred before the Board?

MR. INTRATER: Yes, if Your Honor please, but it is not in the record. The record does not contain all that occurred before the Board.

THE COURT: Does it contain all the evidence that was put before
6 the Board?

MR. INTRATER: No, if Your Honor please, because at this time I wish to raise a constitutional objection to the entire procedure of the Board.

THE COURT: Well, I think that you come too late so far as this hearing is concerned.

* * * * *

MR. INTRATER: If Your Honor please, under those circumstances, I request a continuance so that I may properly bring this before the Court. I shall subpoena into Court Mr. Feuer, who is the Assistant Corporation Counsel who was present at the hearing, not Mr. O'Donnell, and put him under oath and have him testify, and I shall present to the Court full legal argument on this.

I also at this time state that I think in view of the fact that I have not -- and I am willing to take my oath on this, also -- I did not get a copy of his points and authorities, and I think under the circumstances
7 I am taken by surprise.

THE COURT: I asked you whether or not you would be handicapped by that before you began your argument, Mr. Intrater. I have also asked you whether or not this record reflects fully the facts that were presented to the Board. I believe you answered in the affirmative.

MR. INTRATER: It contains, definitely, all of the testimony that was before the Board. It does not contain the remarks of the Board to me. It does not contain those items which would show that, in fact, it is the Board that acts as the prosecuting arm, the prosecuting agency. And if Your Honor please, this is exactly the type of procedure that the United States Court of Appeals for the District of Columbia Circuit condemned

in the case of Amos Treat & Co. vs. Securities and Exchange Commission which appears in 306 Fed 2nd at page 260, 113 U.S. Appeals D.C. at page 100, that is to say, the judge cannot be the prosecutor and the prosecutor cannot be the judge and the judge cannot be the grand jury. And you cannot have a board say, "No, we are going to cite you and investigate you with regard to this and charge you with doing something wrong and then sit there as the judge," because that is not only unconstitutional but it violates every element and essence of our traditions
8 of fair play.

I submit that is exactly what the Board has done in this case. The Board is the accuser and the Board is the judge.

I submit, furthermore, that innocent acts cannot be taken in any sense as substantial evidence of knowledge of guilty acts, and that is all the Board had before it here. The Board had made a pre-determination that the solicitation by performers of the sale of expensive alcholoic beverages was an illicit act and they are going to punish this plaintiff for doing so and for having knowledge of this. And the proof of the pudding is not only what they did, how they conducted it, but the fact that thereafter they even came out and asked the Commissioners of the District of Columbia for such a regulation condemning such acts.

* * * * *

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 21,192

AM-CHI RESTAURANT, INC.,

Appellant,

v.

JOY R. SIMONSON, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 18 1967

Nathan J. Paulson
CLERK

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In the opinion of appellees, the questions are:

1. Whether there is in the administrative record substantial evidence to support the finding of the Alcoholic Beverage Control Board that appellant, in violation of the Alcoholic Beverage Control Act, permitted its licensed permises to be used for an unlawful purpose.

2. Whether, at the hearing on the cross motions for summary judgment, the lower court erred in refusing to allow appellant to inject into the case for the first time an issue not raised by the pleadings and without support in the administrative record.

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* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 21,192

AM-CHI RESTAURANT, INC.,

Appellant,

v.

JOY R. SIMONSON, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

Proceedings before the District Court

This is an appeal from an order of the District Court granting the members of the Alcoholic Beverage Control Board (hereinafter "the Board") summary judgment and denying appellant summary judgment on a complaint seeking injunctive relief from an order of the Board suspending appellant's Class "C"[1] liquor license for a

---

[1] Such a license permits the sale of liquor, wine, and beer for consumption on the premises. Section 25-111, D.C. Code, 1967.

period of fourteen days (J. A. 12). It is alleged in the complaint that, at the hearing before the Board on charges that appellant, in violation of the Alcoholic Beverage Control Act, allowed its premises to be used for an unlawful purpose, namely, the solicitation of prostitution, no evidence was adduced that appellant had "* * * condoned, permitted, or even knew or was aware of the fact that said premises were being used for such unlawful purpose," and that the action of the Board in suspending its license was, accordingly, arbitrary, capricious and without any foundation in fact or in law (J. A. 2).

At the hearing on the cross motions for summary judgment, appellant attempted, for the first time, to inject into the proceedings an issue of whether the Board had violated its constitutional rights by acting "* * * not only as an adjudicatory body but also as, initially, the prosecuting body" (J. A. 25). The court, in refusing to permit this, noted that no such issue was raised by the pleadings, and that no factual support for such a contention is to be found anywhere in the administrative record or in any document filed on behalf of the appellant (J. A. 26-27). The court held that the only issue before the court was whether the action of the Board was supported by substantial evidence, and, finding that it was, entered summary judgment for the Board. After an appeal was noted, this Court, on August 11,

1967, stayed the effectiveness of the order of suspension pending final disposition of the appeal.

Proceedings before the Board

The allegation giving rise to the hearing before the Board is as follows:

> "* * * It is alleged that you [appellant], on, to wit, Tuesday, March 28, 1967, at approximately 12:15 a.m., in violation of Section 17 of the Alcoholic Beverage Control Act [Section 25-118, D. C. Code, 1967], allowed the premises for which the license was issued to be used for an unlawful purpose by your permitting Faye Foreman, a/k/a Donna Hatch, who was employed by you, to solicit a patron for the purpose of prostitution." (J. A. 14.)

The evidence adduced at the hearing before the Board disclosed that Pvt. Curtis, a member of the Morals Division of the Metropolitan Police Department, went to the Celebrity Room on the second floor of appellant's place of business to conduct an undercover investigation. Upon arrival, at approximately 12:15 a.m., he was greeted by a young lady who took him to a darkened area of the restaurant and sat with him at a table. The young lady identified herself as an exotic dancer employed by the restaurant, and asked the officer to buy her a drink. The maitre d'hotel came to the table

to take the order. When the girl ordered a bottle of champagne, the officer asked if she wouldn't have a drink instead. She shook her head, and stated that in that part of the restaurant he would have to buy her champagne. He agreed, and the maitre d'hotel returned with a bottle of champagne and the officer's drink. The price of the champagne was $14.00, which the officer was required to pay immediately, but he was told that he could pay for his drink later. The girl stated that the officer was required to give the maitre d'hotel a tip, which he did. (J. A. 15.)

The two had a brief conversation in which the girl proposed that they meet again later for the purpose of prostitution. She stated that it would cost him $75.00. He agreed to the arrangements, and she left to perform her dance routine. Upon leaving, the girl told the officer that the maitre d'hotel would bring another girl to the table and that he would be asked to buy her champagne, but that he could tell the maitre d'hotel that he was short of money and couldn't afford to buy another bottle of champagne. Immediately thereafter, the maitre d'hotel brought another girl to the table, and the officer was asked to buy her a bottle of champagne. He refused, and bought her a champagne cocktail instead. The girl drank the champagne cocktail, left the table, and the maitre d'hotel moved the officer to another table. (J. A. 16.)

The officer and the dancer met in a hotel room the next day. The officer paid her $75.00, and she disrobed. The girl was then placed under arrest, and thereafter admitted to having engaged in six similar acts of prostitution. She stated that she made the arrangements with all the men at the Celebrity Room in appellant's restaurant. (J. A. 17, 19.) She also stated that the girls at appellant's restaurant were required to have men buy champagne, and that they were told by Sam Schanker, the owner, that if they sold enough champagne they would get an increase in salary. (J. A. 19.)

The police talked with Sam Schanker, who appeared to be running the Celebrity Room, and Schanker denied that he had any knowledge of the soliciting for prostitution. He admitted that the maitre d'hotel was pushing champagne, and that there is a darkened corner of the restaurant. (J. A. 20-21.)

Mrs. Schanker, who is a shareholder in the restaurant and its cashier, employes the maitre d'hotel and all the entertainers (J. A. 21-22). She stated that she permits her female employees to sit at a table with an unescorted man when the man extends the invitation, but that the girls are prohibited from taking the initiative or asking the man to buy them a drink. She denied that there is a darkened area of the restaurant, and denied that the maitre d'hotel pushes champagne. (J. A. 22-23.)

STATUTE INVOLVED

Section 25-118, D. C. Code, 1967.

Revocation of license--Causes--Hearing--Discretionary closing for one year.

If during the period for which any license was issued * * *, any licensee violates any of the provisions of this chapter or any of the rules or regulations promulgated pursuant thereto * * *, or allows the premises with respect to which the license of such licensee was issued, to be used for any unlawful, disorderly, or immoral purpose * * *, or such licensee otherwise fails to carry out in good faith the provisions of this chapter, the license of said licensee may be revoked or suspended by the Board after the licensee has been given an opportunity to be heard in his defense * * *.

SUMMARY OF THE ARGUMENT

It is undisputed that appellant's licensed premises were used for an unlawful purpose in violation of the Alcoholic Beverage Control Act. Although this, in and of itself, is sufficient to form a basis for an order of revocation or suspension, there is substantial evidence that appellant licensee knew or should have known of such unlawful use. Since it chose to operate the typical "B" (bar) girl type of establishment, it can hardly be heard to say that it was ignorant of the ramifications so typical of such an operation.

Appellant's complaint and motion for summary judgment was restricted to the single issue of its responsibility for the unlawful acts of its employee. For this reason, the court below properly refused, at oral argument on the motion, to permit appellant to inject into the proceedings a question as to the constitutionality of the entire administrative procedure.

ARGUMENT

I

There is in the administrative record substantial evidence to support the finding of the Board that appellant permitted its licensed premises to be used for an unlawful purpose.

The thrust of appellant's argument is that no evidence was presented to show that it had any knowledge that its employee was soliciting patrons on the licensed premises for purposes of prostitution. Absent actual knowledge, appellant says, it cannot be held accountable.

The identical argument was made to and rejected by the court in the case of Therault v. O'Dowd, ____R. I. ____, 223 A. 2d 841 (1966). There the liquor license was suspended on the basis of the testimony of a police detective that he observed gambling

activities on the licensed premises. The court, in rejecting the licensee's argument that he must be found to be privy to the unlawful gambling in order to be held responsible, stated:

> " * * * to 'permit any gambling or unlawful gaming' does not require evidence of consent either expressed or implied * * *. 'It is the responsibility of an alcohol beverage licensee so to supervise the operation of a business carried on pursuant to his license as to make certain that the laws to which his license is subject are not violated.' "

In the case if In re Olympic, Inc., 49 N. J. Super. 299, 139 A. 2d 768 (1958), the basis for the order of suspension of the liquor license was the bartender's offering to procure females for patrons for the purpose of prostitution. Refusing to disturb the order of suspension, the court said:

> " * * * And as for the assertion that the bartender's activity was 'unauthorized,' that assuredly presents no valid defense. The licensee's responsibility is not dependent upon the doctrine of respondeat superior, nor upon his personal knowledge or intent or participation; 'he is not relieved even if the violations were contrary to his express instruction.' * * *
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> * * *
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> "Our courts have long recognized the sui generis character of the liquor trade, and the Legislature has from earliest times treated

> that subject in an exceptional manner. Mazza v. Cavicchia, above, 15 N. J. at page 505, 105 A. 2d at page 549. As was there pointed out, the right to regulate the sale of intoxicating liquors is within the police power and practically without limit, and that power has uniformly been accorded liberal judicial support."

This Court, in the case of Lehman v. District of Columbia, 19 App. D. C. 217 (1902), held a licensee criminally liable for the unlawful sales of alcoholic beverages by its agent, saying:

> "It is charged that * * * an employer can not be held liable in a criminal suit for illegal sales made by his agent without his consent or authority. But this proposition we regard as untenable in the present case. * * *
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> " ' It is immaterial whether the sale was made by the appellant or an agent. If made by an agent, the presumption is conclusive that he acted within the scope of his authority. * * * ' "
> (Pages 233-234.)

See also United States v. Voss, 1 Cranch, C. C. 101, 1 D.C. 101 (1801); and Trometer v. District of Columbia, 24 App. D. C. 242 (1904).

To the same effect is Swegle v. State Board of Equalization, 125 Calif. App. Rep. 2d 432, 270 P. 2d 518 (1954), wherein the court said:

> "* * * ' The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature. Even in the case of criminal statutes vicarious liability for the acts of employees is not unknown.' Therefore, whatever is permitted by appellant's agents must be attributed to her." (Page 522.)

In Benedetti v. Board of Commissioners, 85 N. J. Super. 30, 113 A. 2d 44 (1955), the liquor license was revoked because of the conduct of female patrons on the licensed premises. The court, in affirming the order of revocation, rejected the licensee's contention that, absent knowledge, it could not be held responsible for the unlawful activities on the premises, and agreed with the following statement of the Board:

> " ' We would have to be naive to believe that these women could have solicited on the premises without anyone connected with the management learning of it. It is the opinion of this Board that persons connected with the Tavern knew what was going on but turned their backs to it.' " (Page 46.)

The same can be said with respect to the case now before the Court. Although, as previously pointed out, a licensee need not have knowledge of the unlawful conduct on the premises in order to be held accountable, one would have to be most naive to believe that appellant's officers were unaware of the activities which formed the basis for the order of suspension. At least one of the officers was on the premises and could observe appellant's female employees greet unescorted male customers at the door and accompany them to a table in a darkened portion of the premises. Known also was the fact that the maitre d'hotel, together with such female employee, would encourage the male customer to buy a $14.00 bottle of champagne for the girl. From the testimony before the Board, it is quite apparent that the female employees would, during the course of the evening, gravitate to tables where men were sitting alone. In short, appellant was operating what is commonly known as a "B" (bar) girl type operation, and must have known that its employees were engaged in the type of conduct set forth in the administrative record, and which is typical of such an operation. Consequently, appellant has neither a factual nor legal basis to complain of the fourteen-day suspension of its license.

II

Since the issue of the manner in which violations of the Act and Regulations are brought before the Board was not raised by the pleadings, the court below properly refused to permit such issue to be injected into the proceedings for the first time at the hearing on the cross motions for summary judgment.

The substance of appellant's complaint and the sole basis for its motion for summary judgment is that a licensee, absent actual knowledge, cannot be held responsible for the unlawful acts of its agents. Without seeking to amend the complaint, and without the benefit of any supporting affidavits, appellant, for the first time at the hearing on the cross motions for summary judgment, attempted to inject into the proceedings a question as to the constitutionality of the administrative proceedings.

Apparently some statement was made to appellant's counsel at the hearing before the Board which led him to conclude that "* * * it is the Board that decides to charge these various restaurants, night clubs, et cetera, with violations, and then the Board sits in determination as an adjudicatory body to determine whether or not they have done so" (J. A. 25). He represented to the court below that the record

> " * * * contains, definitely, all of the testimony that was before the Board. It does not contain the remarks of the Board to me. It does not contain those items which would show that, in fact, it is the Board that acts as the prosecuting arm, the prosecuting agency." (J. A. 27.)

Appellant's counsel stated that the reason the Board's remarks pertaining to its procedures were not reported is because they were made during the course of argument, which is not taken down and transcribed. It is argued that, had the court below permitted appellant to present testimony as to the nature of the Board's remarks, appellant would show that the Board's procedures were in violation of the principle enunciated by this Court in Amos Treat & Co. v. Securities and Exchange Commission, 113 U. S. App. D. C. 100, 306 F. 2d 260 (1962). There the Court held that a member of the Commission, who, prior to becoming a member, was instrumental and active in an investigation involving that appellant, could not participate in the adjudication of the issues which were the subject of the investigation.

Appellant's counsel did not and does not state that any member of the Board ordered or participated in any investigation of appellant. Indeed, the record shows that the Metropolitan Police Department, rather than the Board's inspectors, discovered, reported, and testified as to the violation which was the subject of the hearing. Nothing

was tendered to support the claim that the procedures followed by the Board fell within the ambit of those condemned in the Amos Treat case. Certainly the mere preparation of the citation on the strength of a report of the Police Department did not preclude the Board from thereafter hearing and adjudicating the case. Hammers v. Board of Fire & Police Commissioners, 10 Ill. App. 2d 218, 134 N. E. 2d 647 (1956), cert. den., 352 U. S. 101; Rose v. State Board of Registration for Healing Arts, ____Mo. ____, 397 S. W. 2d 570 (1966); Chosick v. Reilly, 125 Calif. App. Rep. 2d 334, 270 P 2d 547 (1954); 2 Davis, ADMINISTRATIVE LAW TREATISE, Section 13.10, pp. 237-240 (1958).

In the Hammers case, supra, the Board of Fire and Police Commissioners filed charges against a police officer on the basis of a report of the chief of police. The court, in upholding the order of discharge, stated:

> " It is true that the specific charges * * * were signed by the Board * * *.
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> * * *
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> "The Board * * * was not in fact in this case the accuser, but it was the chief of police, Larkin Jones. The only connection the board had with the charges upon which the plaintiff was tried and found guilty was to have them written down and personally served in conformity with the statute." (Pages 650-651.)

The court, in Chosick v. Reilly, supra, wherein a liquor licensee was accused and found guilty of "* * * employing 'B girls' upon appellants' licensed premises for the purpose of procuring or encouraging purchase or sale of alcoholic beverages and by paying those girls commissions on the sales they procured * * *," upheld the order of revocation stating:

> "* * *In general, the fact that an administrative agency is both accuser and judge is not considered to deprive the accused of due process of law. * * *" (270 P. 2d at 549.)

In any event, this is not a case of something coming to light which was not apparent at the time of filing the complaint. Appellant's counsel was present at the administrative hearing and was aware, at the time of the institution of the lawsuit, what statements the Board allegedly made with reference to the manner in which it proceeds. Appellant chose to go forward on the limited issue tendered, and has made no attempt to justify to the court below or to this Court why it failed, until the day of oral argument on the cross motions for summary judgment, to raise the additional point. Under the circumstances, the court below did not abuse its discretion in restricting the hearing to the issues tendered by the written pleadings.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the court below was, in all respects, correct, and should, therefore, be affirmed.

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